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IN THE

Supreme Court of the United States

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

GERTRUDE WOOTEN,
Respondent.

No. 987

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Pennsylvania Railroad Company, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on March 20, 1961.

OPINION BELOW

(a) The Opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. A copy of such Opinion is appended to this Petition.

JURISDICTION

(b) (i) The date of the judgment sought to be reviewed and the time of its entry is March 20, 1961.

(ii) There was no Order respecting a rehearing, and there was no Order granting an extension of time within which to petition for certiorari.

(iii) The statutory provision believed to confer upon this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1254, subsection 1:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree: * * *"

QUESTIONS PRESENTED

(c) The questions presented for review are:

(1) Whether the Respondent can recover from the Petitioner for personal injuries received when she was a passenger on a through train that ran from Chicago, Illinois, to Miami, Florida, she having purchased her ticket in Indianapolis, Indiana, from the Petitioner and the accident having occurred when the train was on the line of the Atlantic Coast Line Railroad Company;

(2) Whether or not instructions to the jury should have left to the jury the questions of agency and partnership between the two railroads;

(3) Whether or not instructions should have been given leaving to the jury the question of whether or not two coach attendants, at the time of the accident, were em-

ployees of Petitioner within the doctrine of respondeat superior;

(4) Whether or not instructions should have been given leaving to the jury the question of whether the accident occurred in Alabama or Georgia;

(5) Whether or not the doctrine of res ipsa loquitur could be applied to Petitioner as left to the jury by an instruction; and

(6) Whether or not Petitioner should have received a directed verdict in the trial court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(d) There are no constitutional provisions, treaties, statutes, ordinances, or regulations involved in this case.

STATEMENT OF THE CASE

(e)&(g) A concise statement of the case containing the facts material to the consideration of the questions presented is as follows:

The Respondent purchased a round trip ticket from Indianapolis, Indiana, to Jacksonville, Florida, to be used on a train known as the South Wind. Said train operated between Chicago, Illinois, and Miami, Florida. The train was operated over Petitioner's tracks from Chicago through Indianapolis to Louisville, Kentucky, and all the train crew for such portion of the operation were employees of Petitioner. The train, while on its regular route, traveled over the tracks of the Louisville and Nashville Railroad Company from Louisville, Kentucky, to Montgomery, Alabama, and for such portion of the trip, the engineers, conductors,

firemen, and brakemen were employees of the Louisville and Nashville Railroad Company. When the train was on its regular route, it traveled over the Atlantic Coast Line Railroad Company tracks from Montgomery, Alabama, to Jacksonville, Florida, and the engineers, firemen, conductors, and brakemen were employees of the Atlantic Coast Line Railroad Company.

For the entire trip from Chicago to Jacksonville, the dining car crew, a lounge car attendant, and two coach attendants were employees of the Petitioner, except as the doctrine of loaned employee may be applicable.

On the trip involved in this case, there had been a train wreck which required that the South Wind train be rerouted so that the Atlantic Coast Line Railroad Company engineers, firemen, conductors, and brakemen began operating the train at Birmingham, Alabama, over tracks of the Atlantic Coast Line Railroad Company. While the train was on this detour, at about four or five o'clock in the morning, an overnight bag bounced out of an overhead baggage rack onto the Respondent, who was dozing in her coach seat, whereby she sustained injuries.

The train was being pulled by three diesel locomotive units, two of which were owned by the Petitioner and one by the Atlantic Coast Line Railroad Company. There were eighteen cars in the train, consisting of two dining cars owned by Petitioner; ten Pullman cars of which Petitioner owned six, the Atlantic Coast Line Railroad Company owned two, the Nashville, Chattanooga and St. Louis Railroad Company owned one, and the Chicago and Eastern Illinois Railroad Company owned one; four coach cars, one of which was owned by Petitioner, one by the Atlantic Coast Line Railroad Company, one by the Florida East Coast

Railroad Company, and one by the Louisville and Nashville Railroad Company; one lounge car owned by Petitioner; and one baggage car owned by the Florida East Coast Railroad Company. The coach car in which Respondent was riding was the one owned by the Florida East Coast Railroad Company.

The Respondent's round trip coach fare from Indianapolis, Indiana to Jacksonville, Florida, amounted to $52.65. This fare was divided between the railroads as follows:

Petitioner	$ 9.16
Louisville and Nashville Railroad Company	24.72
Atlantic Coast Line Railroad Company	18.77

In addition, there was a special seat charge of $1.00 applicable to reserved seat coaches for the trip south which was retained by Petitioner and an additional $1.00 charge for such reserved seat for the return trip which was retained by the Atlantic Coast Line Railroad Company.

The railroads shared the cost and expense incident to servicing and repairing the locomotives of the train under a pool arrangement, of which the Petitioner acted as a clearing house. The Petitioner received from the pool $20.00 a month for acting as such clearing house.

There was an indemnity agreement from the Petitioner to the Atlantic Coast Line Railroad Company concerning meals, beverages, drinks, and drinkable liquids, and an agreement between Petitioner, the Louisville and Nashville Railroad Company, and the Atlantic Coast Line Railroad Company with reference to locomotives used on the South Wind train.

During the time while the train was operated over a track of one of the said railroad companies, it was in the

general charge of a conductor who was in the employ of that company.

The Petitioner's timetable, available to the public, showed that the South Wind train, on its regular route, was on the Petitioner's road from Chicago to Louisville, on the Louisville and Nashville Railroad Company's road from Louisville to Montgomery, and on the Atlantic Coast Line Railroad Company's road from Montgomery to Jacksonville. Each railroad advertised the train over its name.

The Petitioner's tariff on file with the Interstate Commerce Commission and at the Union Station in Indianapolis where the Respondent purchased her ticket covering this train stated in Rule 3, as follows: "Responsibility of Issuing Carriers. In issuing tickets and checking baggage under this tariff for passage over the lines of other carriers participating herein, the issuing carriers act only as agents and are not responsible beyond their own lines, except as such responsibility may be imposed by law with respect to baggage."

The Respondent's ticket was in eight parts, and each part showed the Petitioner as the "Issuing Carrier". One part of the ticket referred to the Petitioner and to the Cities "Indianapolis to Louisville, Kentucky"; the next part referred to the Louisville and Nashville Railroad and to the Cities of "Louisville to Montgomery, Alabama"; the next part referred to the Atlantic Coast Line Railroad and to the Cities of "Montgomery to Jacksonville"; the next part referred to the Atlantic Coast Line Railroad and to the Cities "Jacksonville to Montgomery, Alabama"; the next part referred to the Louisville and Nashville Railroad and to the Cities "Montgomey, Alabama, to Louisville, Kentucky"; the next part referred to the Petitioner and

to the Cities "Louisville to Indianapolis"; the next part, labeled "Contract Not for Passage," referred to "R.T., 6 Mo., Indianapolis to Jacksonville, Florida"; and the last part, labeled "Agent's Stub Not for Passage," was detached from Respondent's ticket by the Indianapolis Union Railway Company and delivered to the Petitioner's Auditor. The other part of the ticket labeled "Not for Passage" was retained by the Respondent after the remaining six parts had been detached. Taking the portions of the ticket in the order named above, the first three parts of the ticket were detached on the Respondent's trip to Jacksonville, and the next three parts were detached on her return trip to Indianapolis.

The Respondent's seat ticket from Indianapolis to Jacksonville consisted of three detachable parts, the first of which was designated "Agent's Stub" and was detached by the Indianapolis Union Railway Company and delivered to Petitioner's Auditor. The second part of said seat ticket designated the amount of the seat charges, and the third part designated the coach car and the number of the seat called for by the ticket.

Each portion of all of these tickets showed the Petitioner was the "Issuing Carrier" and contained the statement at the bottom thereof, as follows:

> "Subject to tariffs. Selling Carrier is Agent only —not responsible beyond its line, except as law imposes liability for baggage. Non-transferable."

The words "carriers participating" in the tariff-quoted above meant the Louisville and Nashville Railroad Company between Louisville, Kentucky, and Montgomery, Alabama, and the Atlantic Coast Line Railroad Company between Montgomery, Alabama, and Jacksonville, Florida.

The accident involved in this case occurred when the train was either in the State of Alabama near the boundary line of that state and the State of Georgia or else in the State of Georgia after the train had crossed the boundary line. The Respondent was dozing in her seat in the next to the last car of the train which had the number SW-2. She did not know whose baggage it was that fell on her, but a ladies' overnight bag bounced off an overhead rack and struck her. The accident occurred around four or five o'clock in the morning on December 23, 1957.

Carrell West was a Coach Attendant employed by the Petitioner on the South Wind. His duties were to check all the luggage in the baggage racks to see that it was in its proper place, check the floors to see that there wasn't any water or anything there so that someone would slip and be injured, keep his car clean, and help the passengers on and off with their baggage. He also took orders from the Conductor. Coach Attendants have different rest periods. These are at night. He heard this accident happened about five o'clock in the morning, but he didn't know anything about it. Grants told him he wouldn't have been on duty at that time. It is possible to get two bags, if they aren't too large, stacked one on top of the other on the baggage racks, but the Coach Attendants don't stack them. Carrell West has seen them stacked in the station, but the Attendants take them down before they leave. In West's experience, he has never seen any of the baggage "jiggling up in the rack." After the passengers get settled, if they want something out of one of their grips, if it is a small one and they can lift it down, they will sometimes get it down themselves and get what they want. On December 22 and December 23 of 1957, West does not remember seeing anything out of the way in the manner in which the baggage was stacked on any of the baggage racks. It was all in order.

Vandor D. Grants was a Coach Attendant on the South Wind that left Chicago on December 22, 1957. The coach seats were nearly full. The baggage racks were not altogether filled up with baggage. Most of the large baggage was at the end of the car. The small bags were overhead. The Coach Attendant moves the bags the first time he sees they are stacked on top of one another. Most of the passengers will double-stack them when they get on the train. The Attendants move them. The Attendants also put baggage on the racks. Grants was in car one which was on the rear of the train and was told by a trainman that a bag fell on a lady in car two. Grants went and told the Conductor. Grants had been cleaning cars, starting with car five and going back to car one. Car two was the second car from the rear end. His cleaning and check of rest rooms would take thirty-five, forty, or thirty minutes. Mr. West was on his rest period. The accident was brought to his attention about four o'clock in the morning. After the train is underway, most of the people ask to have baggage handed down if they can't take it down themselves in case they wish to "exchange in the night." Sometimes they will put it back up and they have it tilted on the rack, and the Attendants have to push it back.

The trainman Grants talked about in car one was a brakeman or a flagman.

When Grants heard of the accident, he went to see the lady. She said the bag that fell was the other lady's sitting by her. It weighed five or six pounds. The bag was on the floor in the aisle of the car. The lady who was hurt was named Gertrude Wooten. She was sitting next to the aisle in Seat 22.

Grants picked the bag up off of the floor and put it back on the rack. There was plenty of room for it. There was no bag stacked on top of another.

About four o'clock in the morning on December 23, 1957, the train was on a freight line. It was rocking more than it does on the main line. This was so just before he learned of the accident. The train was not going as fast as on the regular track because it shakes. That will make the baggage shake too. Grants could not say how long it had been before the accident that he had been in Car SW-2. It could have been as much as a half-hour, but he couldn't say how long it was.

Before the Respondent was injured, Grants had gone through Car SW-2 and gone back to Car SW-1. The baggage was situated on the racks "O.K." They had little lights shining. When he got into Car SW-1, he continued his cleaning in that car. The car that Carrell West was using to take his rest in was not SW-2.

Sometimes in the middle of the night passengers get their own overnight luggage down to use it and put it back. At the time Grants was in Car SW-2 before going to Car SW-1, most of the people were asleep. He didn't see anybody walking around.

Pearl I. Hansen in her deposition testified that on December 23, 1957, she was on the South Wind bound for Miami. She saw the accident about four o'clock A. M. She was seated one seat back from the Respondent and across the aisle. She was wide awake. An overnight case bounced out of the luggage compartment overhead and fell down on to Respondent. It hit her shoulder, went down on to her side, then to the floor and slid three or four feet down the aisle. She did not notice any undue speed or lurching

or anything unusual about the momentum of the train. There was no one standing near the place where the luggage was before it struck Respondent. She had not seen any person handle or touch any luggage near that point in an hour before the accident. She had not noticed anything adverse about any luggage, although it was congested. In a statement made Exhibit 1 to her deposition, the accident was described as being at or near Cragford, Alabama.

O. V. Horace is employed by the Atlantic Coast Line Railroad Company and has been with that railroad forty-five years. In December of 1957, he was Superintendent. When he learned of a derailment on the regular route of the South Wind, he telephoned the General Superintendent at Jacksonville, Florida, and asked him to detour the South Wind northbound and the southbound South Wind. Petitioner's Exhibit B is a map which includes the Atlantic Coast Line Railroad as it was in December of 1957. Cragford, Alabama, is about thirty-five miles from the Alabama-Georgia State line. In December of 1957, the Conductors on the Atlantic Coast Line Railroad had uniforms of a dark blue serge and a cap which had the word "Conductor," but did not have "P.R.R.", on it. When the train was picked up on this particular trip to go over the detour, arrangements had to be made for a train crew of the Atlantic Coast Line Railroad Company to get on at Birmingham. The positions of such crew were conductor, engineer, fireman, baggagemaster, and brakeman. The flagman was supposed to ride on the rear of the train. The duties of a Conductor on his railroad on the South Wind were to secure tickets, see that passengers were detrained at the correct destinations, see that passengers were boarded, seated, and made comfortable, and to pass through the train at intervals for the comfort of the passengers to see

if he could do anything for them. He was responsible for the safety of the train and the personnel of the train. He was the superior officer of the crew. The train crew and other employees, including the Coach Attendants of The Pennsylvania Railroad Company, were under the direction and supervision of the Conductor. The witness Horace had a book of rules of the Atlantic Coast Line Railroad Company which were in effect in December of 1957. Rule 858 reads as follows:

> "Conductors must be familiar with the duties of all members of their crew and all persons employed on trains including Pullman, dining car, express and postal employees, news agents and other train attendants and must enforce the rules applicable to such person while on that train, reporting any case of insubordination, misconduct or failure of duty."

Rule 859 reads as follows:

> "Conductors must pass through their trains for the collection of transportation after leaving each station where their train stops and where it stops at long intervals, they must pass entirely through trains frequently to be assured of the comfort and welfare of passengers and to see that trainmen and others are performing their duties."

Rule 883 under heading of "Conductors" reads as follows:

> "They are responsible for the prompt movement, safety and proper care of their trains, for the performance and conduct of persons employed thereon, and must report any misconduct or neglect of duty. They must not permit any member of the engine or train crew to work if his condition renders him unfit to do so. They must see that the members of their crew are familiar with their duties, ascertain the extent of their experience and instruct them in the safe performance of their work."

The duties of The Pennsylvania Railroad Company's Coach Attendants when they arrive on the Atlantic Coast Line Railroad are to be governed by the Conductor's instructions in assisting in boarding and detraining passengers, comfort of the passengers, to see that the lights are dimmed for the passengers to get their rest in day coaches, and any duty that the Conductor would delegate them to do on the Atlantic Coast Line Railroad in the performance of their duties for the comfort and safety of the passengers. They would be the same as Atlantic Coast Line Railroad Company Attendants. Witness Horace did not know The Pennsylvania Railroad Company instructions. The Atlantic Coast Line Railroad Company Conductors would change the duties of The Pennsylvania Railroad Company's Coach Attendants if necessary. They have perfect jurisdiction over the porters on that train. A porter would be under the jurisdiction of the Conductor on the Atlantic Coast Line Railroad.

The Amended Complaint of the Respondent referred to the train as the Petitioner's train and alleged that at the time of the injury the train was being operated by another railroad company acting either as Petitioner's agent or partner. The Amended Complaint charged that the injuries were "a proximate result of negligence on the part of the defendant and of its said agent or partner, in that (1) they permitted said piece of baggage to remain loose on said coach rack during sleeping hours when the plaintiff was asleep and could not protect herself against the same when it was jostled down by the movement of the train, (2) they operated the train in a negligent manner in said circumstances and thereby caused said piece of baggage to fall from said rack onto the sleeping plaintiff." These allegations were denied by the Petitioner, except that Petitioner admitted that if the alleged

injury occurred, it occurred on a track belonging to another railroad company.

The case originated in the United States District Court for the Southern District of Indiana, Indianapolis Division, and the basis for Federal jurisdiction was that the Respondent was a citizen of the State of Indiana; that the Petitioner was a corporation organized under the laws of the State of Pennsylvania, was a citizen of that state, and had its principal place of business in that state; and that the amount in controversy, exclusive of interest and costs, exceeded the sum of Ten Thousand Dollars.

ARGUMENT

(h) The contested issues present the question of whether or not the Petitioner can be held liable for injuries to a passenger received when a piece of luggage fell off of an overhead rack and struck the Respondent after the train had left this Petitioner's line and was traveling on the line of another railroad. The Amended Complaint refers to the train as the Petitioner's train, alleges that the Petitioner undertook to transport the Respondent all of the way from Indianapolis, Indiana, to Jacksonville, Florida, and alleges that when the train was not on this Petitioner's line, it was operated by an agent or partner of the Petitioner.

Admittedly, there was a sharing of the Respondent's train fare by the railroads involved and a sharing of certain expenses. No one would expect any one railroad to participate in the operation of a through train without receiving some of the fare and without paying some of the expenses.

As to the train being the Petitioner's train at the time of the accident, the Stipulation of the parties shows that the cars were owned by several railroad companies, including the Petitioner, and that the three diesel units pulling the train were owned two by the Petitioner and one by the Atlantic Coast Line Railroad Company. At the time of the accident, the operating crew were Atlantic Coast Line Railroad Company employees.

On the agency question, there was an utter lack of evidence to show that this Petitioner had the right to control the operation of the train at the time of the accident. The train was in the charge of an Atlantic Coast Line Railroad

Company Conductor who may be likened unto the captain of a ship. He had complete charge over all of the personnel on the train. The train, as a matter of fact, was being detoured under directions of the Atlantic Coast Line Railroad Company over tracks of the Atlantic Coast Line Railroad Company. Without this Petitioner's right to control and without a duty on the part of the Atlantic Coast Line Railroad Company to obey instructions of the Petitioner, there would be no agency. There was no showing of such a right and of such a duty. Therefore, the Respondent failed in her burden of proof on this issue. 2 Am. Jur. 202 (Agency, § 251) and page 13 (Agency, § 2).

On the partnership question, there is no showing of a joint interest and community in profit and loss among the various railroads. The train started in Chicago, Illinois, and went to Miami, Florida. It might make money while on one of the railroad company's lines and lose money while on another railroad company's lines. This Petitioner operated the train from Chicago, through Indianapolis, to Louisville. This Petitioner received no revenue from passengers that boarded the train from Louisville on south. Likewise, none of the other railroads received revenue from passengers traveling only from Chicago to Louisville or from and to points between Chicago and Louisville. No railroad had an interest in a profit or loss sustained by one of the other railroads. Therefore, the Respondent failed to sustain her burden of proof on this issue. 10 Am. Jur. 429 (Carriers, § 1695).

The Petitioner's timetable and the ticket purchased by the Respondent showed that the Petitioner operated the train as far south as Louisville and that rest of the Respondent's transportation was by the Louisville & Nashville Railroad Company and then by the Atlantic Coast

Line Railroad Company. The ticket was in several portions that could be detached by the respective railroads. Each portion of the ticket stated that it was sold "Subject to tariffs. Selling carrier is agent only—not responsible beyond its line, except as law imposes liability for baggage. Non-Transferable." The Petitioner's tariff on file with the Interstate Commerce Commission and covering this train stated in Rule 3, as follows: "Responsibility of Issuing Carriers. In issuing tickets and checking baggage under this tariff for passage over the lines of other carriers participating herein, the issuing carriers act only as agents and are not responsible beyond their own lines, except as such responsibility may be imposed by law with respect to baggage." The decision in the case of *Louisville & N. R. Co. v. Chatters*, 279 U. S. 320, 330, 331, 49 S. Ct. 329, 332, holds that in a situation of this kind, there is no duty to transport or assume any responsibility for transportation of a passenger beyond its own line, and that the limitation of liability in the tariff became a lawful condition upon which the service was rendered, binding alike on the carrier and its patron. The difference between the *Chatters* case and the case at bar is that it does not appear that the Petitioner in the *Chatters* case had any employees on the train at the time of the accident, whereas, in the case at bar, the dining car men, the lounge car attendant, and the coach attendants were, as a general proposition, employees of this Petitioner. We do not believe that the Respondent contends that any liability can be based upon the conduct of the dining car men or the lounge car attendant, but Respondent does contend liability can be placed upon one or both of the coach attendants, who were Vandor D. Grants and Carroll West. The undisputed evidence shows that Grants and West were under the complete control of the Atlantic Coast Line Railroad Company Conductor at the time of the accident. They

would be loaned employees. The doctrine of *respondeat superior* would make the Atlantic Coast Line Railroad Company responsible for their conduct and not the Petitioner. *Martin* v. *Anniston Foundry Co.*, 259 Ala. 633, 637, 68 So. (2d) 323, 327; *Delcher Bros. Storage Co.* v. *Reynolds & Manley Lumber Co.*, 80 Ga. App. 288, 292, 55 S. E. (2d) 864, 867.

Furthermore, there was no evidence of negligence on the part of West or Grants. This accident occurred about four or five o'clock in the morning when some of the passengers were asleep and the Respondent was dozing. The Amended Complaint alleges negligence in permitting the piece of baggage that fell to remain loose on the coach rack during sleeping hours when the Respondent was asleep and could not protect herself against the same when it was jostled down by the movement of the train and in operating the train in a negligent manner in said circumstances, thereby causing the piece of baggage to fall from the rack onto the Respondent. There was no showing that there was a more practical way to stow the baggage than was done in this case. There was no showing that the baggage was improperly placed on the rack. The piece of baggage was a small overnight bag. The Respondent did not testify as to anything being out of order, except that the baggage did fall and hit her. Carroll West was in a car forward of the Respondent having a rest period. Vandor D. Grants passed through the car the Respondent was in, cleaned it and inspected it, and had gone to the car to the rear of the Respondent's car when the accident happened. When he was in the Respondent's car, the baggage was all in order. He was unable to testify as to the length of time from when he was in Respondent's car until he heard of the accident. The only witness who saw the accident was Pearl I. Hansen. She was awake and saw nothing out of order before

the baggage fell. As to the negligent operation of the train, we, first of all, come back to the agency and partnership questions heretofore discussed. However, there was no evidence of any sudden lurch of the train or of a sudden application of the brakes or change in the rate of the speed of the train. There was some evidence that the detour route being used at the time of the accident was rougher than the regular route, but no negligence is charged in that respect. Furthermore, it is common knowledge that trains in motion shake to some extent.

The Petitioner moved for a directed verdict at the close of the Respondent's evidence and again at the close of all of the evidence. (Record pages 167 and 168.) These motions were overruled. (Record page 169.) Under the above facts and authorities, these motions should have been sustained.

The Petitioner objected to several of the Court's instructions. Instruction No. 18 appears in the Record at page 229, and the Petitioner's objection thereto at page 54. The instruction left to the jury the question of whether the accident occurred in the State of Alabama or the State of Georgia and applied the rules applicable to common carriers of passengers of the two states, which are somewhat different. The Stipulation of the parties was that the accident occurred either in Alabama or Georgia. (Record pages 139 and 140.) In Exhibit No. 1 to Pearl I. Hansen's deposition, the accident is referred to as having been at or near Cragford, Alabama. (Record page 109.) The word "near" is a relative term, and the accident could have been in Georgia and still have been near Cragford, Alabama, within the meaning of the word "near." There was no evidence as to just where the accident did occur. The objection to Instruction No. 18 was that it was a

matter of pure speculation as to which state the accident occurred in, that the jury should not be permitted to speculate on the facts, and it followed that the Court was speculating on what the law was. The further objection was made that the rules of law applied to common carriers of passengers, and it was not shown that this Petitioner was a common carrier of passengers in either state. The jury should not have been permitted to base a verdict on speculation or to render an arbitrary verdict. *Gay, Sullivan & Co., Inc.* v. *Glaser, Crandell Co.*, 102 Fed. (2d) 149, 150; *Lieberthal* v. *Glens Falls Indemnity Co.*, 174 Fed. (2d) 638, 640. The point that this Petitioner was not a common carrier in either state has been argued above.

Instruction No. 19 appears in the Record at page 230, and the Petitioner's objection thereto at page 55. The instruction submitted to the jury the questions of whether or not the Atlantic Coast Line Railroad Company was the partner or agent of the Petitioner and whether or not Carroll West and Vandor D. Grants at the time of the accident were employees or agents of the Petitioner and whether or not they were negligent. The objection was to the effect that there was insufficient evidence to submit such questions to the jury, as argued above.

Instruction No. 20 appears in the Record beginning on page 232 and again submitted to the jury the question of agency and partnership. The Petitioner's objection thereto appears on page 56 of the Record and states that it is for the same reasons given for the objection to Instruction No. 19 on the question of agency and partnership.

Instruction No. 22 appears in the Record beginning on page 234, and the Objection thereto appears on page 56. These involved the same questions of agency and partnership and the same objection.

Instruction No. 23 appears in the Record beginning on page 235, and the objection thereto appears on page 56. The same questions of agency and partnership and the objection thereto are involved.

Instruction No. 25 appears in the Record on page 239, and the objection thereto on page 56. This instruction involved the doctrine of *res ipsa loquitur*. The Petitioner objected on the ground that there was no evidence that the instrumentality causing the baggage to fall was under the exclusive control of the Petitioner or its employees or its agents or partners. The Petitioner objected for the same reasons as given to the Court's Instruction No. 19 and further pointed out that the evidence showed that even the passengers on the train did at times handle the baggage on the rack and that the instruction was not applicable to the evidence.

It is error to give instructions not applicable to the evidence. *McCarthy* v. *Pennsylvania R. Co.*, 156 Fed. (2d) 877, 882; *Colas et al.* v. *Grzegorek et al.*, 207 Fed. (2d) 705, 710.

IT IS, THEREFORE, respectfully submitted that Petition for Writ of Certiorari should be granted.

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March 20, 1961]

Before HASTINGS, *Chief Judge*, KNOCH and CASTLE, *Circuit Judges*.

HASTINGS, *Chief Judge*. Gertrude Wooten, plaintiff-appellee, brought this diversity action against defendant-appellant Pennsylvania Railroad Company for personal injuries plaintiff received which were allegedly caused by the negligence of defendant. The case was tried before a jury which returned a verdict for plaintiff. Defendant's motions for a directed verdict and for judgment notwithstanding the verdict were denied, and defendant appealed.

The first issue in this appeal is whether there was sufficient evidence for the trial court to send the case to the jury to determine the question of defendant's negligence. The nature and extent of plaintiff's injuries and the amount of her recovery are not contested here.

Plaintiff was injured by a piece of baggage which fell from a rack above her as she was traveling by train from Indianapolis, Indiana to Jacksonville, Florida. The piece of luggage jiggled loose from the rack while the train was traveling over a stretch of rough freight track in a forced detour caused by an earlier accident on the main passenger track. Plaintiff was injured at approximately 5:00 a.m. on the morning of December 23, 1957, as her train was in the vicinity of the Georgia-Alabama boundary.

Plaintiff had boarded the train, taken her reserved seat and was asleep in it when the piece of baggage fell and struck her.

One eye-witness gave her recollection of the accident in her deposition. She was wide awake and seated one row back and across the aisle from plaintiff at the time. The witness saw a ladies' overnight case bounce out of the luggage compartment above, hit plaintiff on the shoulder, and then fall to the floor. At the time no one was handling, touching, or was in the vicinity of the luggage, nor had anyone handled any nearby luggage. The witness did not remember any unusual speed or lurching of the train at the time of the accident.

Plaintiff had purchased her round trip ticket to Jacksonville from Indianapolis Union Railway Company, defendant's selling agent. The ticket was for passage on the "South Wind" train, a through service from Chicago, Illinois to Miami, Florida provided since 1940 by defendant, the Louisville and Nashville Railroad Company, and the Atlantic Coast Line Railroad Company. The ticket that plaintiff purchased indicated on its face that defendant was the "Issuing Carrier." Each portion of the ticket had printed upon it the following limitation:

> "Subject to tariffs, Selling Carrier is Agent only—*not responsible beyond its line*, except as law imposes liability for baggage. Non-transferable." (Emphasis added.)

The tariffs referred to in the ticket limitation were on file with the Interstate Commerce Commission at Washington, D.C. and with the Indianapolis Union Railway Company at Indianapolis, Indiana and contained the following statement:

> "Rule 3. *Responsibility of Issuing Carrier.* In issuing tickets and checking baggage under this tariff for passage over the lines of other carriers participating herein, *the issuing carriers act only as agents and are not responsible beyond their own lines* [emphasis added], except as such responsibility may be imposed by law with respect to baggage."

Defendant relies on the language of the ticket and the tariffs to restrict its liability to accidents occurring on its own line.

The South Wind traveled from Chicago to Louisville (with one irrelevant exception) on track leased and maintained by defendant. On the first leg of the trip, the locomotive crew, brakemen and conductor were employees of defendant. From Louisville, Kentucky to Montgomery, Alabama the conductor, locomotive crew and brakemen were employees of Louisville and Nashville, and the train traveled over that railroad's tracks.

At the time of the accident, the South Wind was traveling over tracks owned and maintained by Atlantic on the third stage of the trip, from Montgomery to Jacksonville. The locomotive crew and brakemen of the train were employees of Atlantic, and a conductor employed by Atlantic was in general charge of the train. At this point, there were eighteen cars on the South Wind, including two dining cars owned by defendant, ten Pullman cars (defendant owned six), four coach cars (defendant owned one), defendant's lounge-coach car, and a baggage car owned by Florida East Coast Railway Company. Three diesel locomotives were used on the entire trip and were owned by defendant.

The coach car in which plaintiff was injured was owned by Florida East Coast. Two coach attendants were on

duty and in charge of this car from Chicago to Jacksonville. *These two attendants were employed and paid by defendant.* Both wore uniforms and caps bearing defendant's insignia. Their duties included placing baggage on overhead racks in the coach cars and securing it during transit to keep it from falling. In addition, they had the responsibility to check the floors for water or other slippery materials, to keep the cars clean and to help passengers on and off the train with their luggage. At the time of the accident one attendant was taking his rest period and was not in the coach in question. The second, on-duty attendant, who had the responsibility for five coach cars during the other's rest period, was then in a separate coach car, cleaning the cars and restrooms. He stated that he had been cleaning the coach in which plaintiff was riding approximately one-half hour before the accident and had not noticed that the luggage was insecure at that time. After being notified of the accident, the on-duty attendant aided plaintiff; he found the overnight case on the floor and lifted it back onto the luggage rack.

In these circumstances plaintiff advanced three theories under which it contended that defendant was liable for plaintiff's injuries. All three theories were presented to the jury which returned a general verdict finding against defendant. Plaintiff's first theory charged that defendant's own coach employees were negligent in allowing the luggage to remain loose on the baggage racks during sleeping hours. Second, it argued that defendant was in partnership with Atlantic and Louisville and Nashville in the operation of the South Wind. Finally, as the issuing carrier, plaintiff asserted that defendant operated the South Wind to Jacksonville as a principal and had an agency relationship with the other two carriers. As to the final two theories, plaintiff contended that defendant's

partners or agents operated the South Wind in a negligent manner causing the baggage to be shaken off the luggage rack, striking and injuring plaintiff while she was asleep and unable to protect herself.

An examination of the record in this case clearly reveals that the issue of defendant's negligence was properly submitted to the jury. We have said that in "reviewing the ruling of a trial court on a motion for a directed verdict or for judgment notwithstanding the verdict, we must determine whether the evidence justifies the submission of the case to the jury. Such a motion should be denied where the evidence, along with all inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions. *Valdes* v. *Karoll's Inc.*, 7 Cir., 277 F. 2d 637, 638 (1960), and cases cited therein." *Threatt* v. *United States Steel Corporation*, 7 Cir., 283 F. 2d 411, 413 (1960).

The issue of the alleged negligent conduct of defendant's coach employees—who had the responsibility for securing baggage in the racks—was a matter of disputed fact to be resolved by the jury. Further, a defendant's argument that these two employees were "loaned" to Atlantic, thereby making Atlantic the sole principal liable for the injury, was a matter of disputed fact. Here, plaintiff offered proof that these employees were hired, trained and paid by defendant and, in the absence of orders from the Atlantic conductor, performed their duties according to defendant's training and instruction. Whether these employees were acting in the course of their employment by defendant was a factual issue properly submitted to the jury. Defendant's proof clearly did not fore-

close reasonable men from reaching differing conclusions on this issue.

In addition, there was sufficient evidence to take the case to the jury on the issues of agency and partnership. Defendant's brochure advertised the South Wind as a through train service provided by defendant and Louisville and Nashville. An agreement among the three participating railroads indicated that the South Wind was operated "in joint service." Certain of defendant's dining car, lounge and coach employees continued on duty on the train on the entire trip to Jacksonville. The fare for the ticket was divided among the three railways. Defendant retained the entire one dollar special charge for a reserved seat from Indianapolis through to Jacksonville. A schedule of rental payments for the use of diesel locomotives was arranged. The working agreement included provisions for use of track and an allocation of cost and expenses of maintaining locomotives and other general expenses. In addition there were indemnity agreements between the parties relating to the operation of the locomotives and to the liability arising from the dining service provided by defendant on the South Wind. Plaintiff offered sufficient evidence to make the issues of agency and partnership matters of disputed fact and thereby preclude a directed verdict in defendant's favor.

The record reveals there were genuine issues of fact as to the negligence of defendant's coach employees and Atlantic's employees. It further indicates a dispute as to the status of defendant's coach employees and the relationship between defendant, Atlantic, and Louisville and Nashville. If the jury was convinced that the alleged negligence existed and could be imputed to defendant, then defendant's disclaimer of liability printed on its ticket and in its tariff could not absolve it from liability oc-

curring beyond its own line. *Rosenfeld* v. *The Peoria, Decatur and Evansville Railway Company*, 103 Ind. 121, 123 (1885). 10 Am. Jur. (Carriers) § 1694, p. 428. Defendant's reliance in this regard upon the case of *L. & N. R. Co.* v. *Chatters*, 279 U.S. 320 (1929) is misplaced. There, a directed verdict in favor of an issuing carrier was proper in a tort suit against it and the connecting carrier where there were no allegations or proof of negligence by its employees or of such relationship that negligence could be imputed to the issuing carrier. These very issues were in dispute in the case before us.

Defendant contends that the trial court erred in giving certain instructions to the jury. Each of these instructions was properly objected to at trial. Defendant does not assert that the instructions are erroneous as a misstatement of the law, but states that they were inapplicable and prejudicial in the circumstances of this case. The court's instructions relating to the partnership and agency relationship between defendant and Atlantic, the status of defendant's two coach employees, and their alleged negligence were objected to on the ground that there was insufficient evidence to submit such questions to the jury. However, we have held above that on the evidence in the record those issues were matters of disputed fact and that the trial court properly submitted them to the jury. These instructions were properly given.

Next, defendant objected to an instruction which correctly stated the duty of care of common carriers under Alabama and Georgia law and required the jury to apply the proper standard to defendant's conduct, depending upon the state in which the jury found the accident occurred. Defendant asserted that "it was a matter of pure speculation as to which state the accident occurred in, that the jury should not be permitted to speculate on the

facts, and it followed that the Court was speculating on what the law was." We disagree. The parties had stipulated that the accident happened either in Alabama or in Georgia. The accident occurred at nighttime, and it was difficult to establish its precise location. There was deposition testimony that the accident occurred in Alabama, and the stipulation established that the train stopped in Georgia to allow a physician to board to attend to plaintiff's injuries. This testimony presents a substantial factual basis upon which to instruct the jury. In any event, the standards of care established by Alabama and Georgia in these circumstances are not materially different[1], and the placement of the accident is not a crucial element in plaintiff's recovery.

Defendant asserts that it was error for the court to give an instruction on *res ipsa loquitur* in the circumstances here. We have said that such instruction is "a rule which permits or requires an inference of negligence to be drawn from the fact of an accident plus the circumstances which characterize the accident. It is an evidential inference, which will carry a case to the jury, but is not binding upon the jury * * *." *Eker* v. *Pettibone*, 7 Cir., 110 F. 2d 451, 455 (1940). *Cochran* v. *Pittsburgh & L. E. R. Co.*, D.C.N.D. Ohio, 31 F. 2d 769, 771 (1923). We have examined the record and find there was sufficient factual evidence of defendant's control of the coach car and the train itself to make appropriate the instruction defendant objects to.

Finding no error, the judgment of the district court is

AFFIRMED.

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[1] In Alabama the law requires common carriers of passengers to exercise "the highest degree of care, skill, and diligence." *Alabama G.S. R. Co.* v. *Hill*, 93 Ala. 514, 521, 9 So. 722, 725 (1891). In Georgia the law requires "extraordinary diligence." *Southern Ry. Co.* v. *Reeves*, 116 Ga. 743, 744, 42 S.E. 1015 (1902).

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March 20, 1961]

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

Hon. JOHN S. HASTINGS, Chief Judge

Hon. WIX G. KNOCH, Circuit Judge

Hon. LATHAM CASTLE, Circuit Judge